FILE COPY

No. 205

IN THE

Supreme Court of the United States

October Term, 1958

HELEN M. KRAUS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CHARLES L. DAWSON
Attorney for the Petitioner
1010 Shoreham Bldg.
Washington 5, D. C.

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions Involved on Appeal	2
Statement of the Facts	2
Specifications of Errors to be Urged	4
Reasons for Granting the Writ	5
Conclusion	11

CASES CITED

Bailey v United States, 92 F.2d 456	10
Claflin v Commonwealth Ins. Co., 110 U.S. 81, 28 L.Ed. 76	6
Clohesy v United States, 199 F.2d 475, 7th CCA	11
Jones v United States, 112 F.2d 282	10
Lehigh Zinc & L. Co. v Bamford, 150 U.S. 665, 673, 37 L.Ed. 1215	6
Mutual Life Ins. Co. v Hilton-Green, 241 U.S. 613, 60 L.Ed. 1202	6
Pence v United States, 316 U.S. 332, 86 L.Ed. 1510	4, 6
Thompson v United States, 109 Fed. Supp. 283	11
United States v Kelley, 136 F.2d 823, 9th CCA	11

STATUTES, ETC.

Title 28 U.S.C. 2101(c)	2
Title 38 Section 802(c)(2)	7

IN THE

Supreme Court of the United States

October Term, 1958

No.

HELEN M. KIEFER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on May 8, 1958 (A 115).

OPINIONS BELOW

The Judge of the United States District Court for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia is set forth at pages 113 and 114 of the record.

JURISDICTION

The judgment of the United States Court of Appeals was entered on May 8th, 1958 (A 115). This petition for certiorari is filed within ninety days from the date of the said judgment pursuant to the provisions of Title 28 U.S.C. 2101(c).

QUESTIONS INVOLVED ON APPEAL

The question in this case is whether George N. Herbert committed fraud in the reinstatement of his National Service Life Insurance policy.

STATEMENT OF THE FACTS

This was a suit brought by Helen M. Kiefer on the National Service Life Insurance policy of her late brother George N. Herbert. In order that this Court may fully understand the true facts in the case, a full and complete statement must be made. While in the Military service of the United States, George N. Herbert applied for, and was granted, National Service Life Insurance in the amount of $10,000, and paid premiums until the date of his discharge in January, 1946. On October 3, 1946 he applied for reinstatement of only $5000 of this insurance on which premiums were paid to include August, 1947. On April 26, 1948 he reinstated $5000 of the insurance which had lapsed, and paid premiums through November, 1951. Premiums on the last reinstatement were deducted from his compensation payments from the Veterans Administration. It is this last reinstatement that the government claims was reinstated by fraud.

George N. Herbert was a war casualty in that he was awarded, and paid, compensation by the Veterans Administration for a disability of asthma for which he was rated 60% disabled. Because his disability was incurred in the service, he was entitled to reinstate his insurance at any time prior to January 1, 1950 if his service-connected

disability was less than total under provisions of Section 802(c) (2) of Title 38 of the United States Code. The Courts below took the viewpoint that the reinstatement was on a comparative health basis in which they are clearly in error.

In the application for the reinstatement the insured stated that he had applied for compensation, and gave his compensation number in the Veterans Administration. The defense of fraud is entirely predicated upon the medical reports contained in the files to which the insured referred when he made out the application for reinstatement. These medical reports were examinations by governmental physicians, and it is admitted that they were all contained in his file in the Veterans Administration. The defense of fraud is entirely predicated upon the medical reports admitted to be in the possession of the Veterans Administration at the time that the reinstatement was effected. Furthermore, the officials of the Veterans Administration knew that he had been examined by their physicians because the premiums were deducted from his compensation payments.

At the first trial Judge Alexander Holtzoff sustained the motion of the petitioner for a summary judgment based upon the fact that the Veterans Administration was bound to take notice of their own files, and in so doing followed the decisions at that time which so held.

The Court of Appeals below reversed the judgment. A petition for certiorari was filed in this Court because of the clear conflict between the decisions of the Ninth Circuit, and the Seventh Circuit, and the decision of the Court of Appeals below. This Court failed to enforce its own rules, and the petition was denied.

This case then went to the United States District Court, and a trial before a jury, Judge Letts presiding. At the conclusion of all of the evidence the petitioner, and the respondent, both moved for a directed verdict. The Court

sustained the motion of the respondent, and the petitioner appealed.

The Court of Appeals rendered a per curiam opinion not deciding any of the questions of law raised by the petitioner, and citing no authorities in support of its decision obviously upon the ground that there were no precedents that could be cited in support of its judgment. The points relied upon by the petitioner will be discussed fully in the reasons for granting the writ.

SPECIFICATIONS OF ERRORS TO BE URGED

The petition will urge that the decision of the United States Court of Appeals for the District of Columbia in this cause conflicts with decisions of this Court and other decisions of the United States Courts of Appeals. That the decision of the Court of Appeals conflicts with the decision of this Court in the case of Pence v U. S. 316 U.S. 332, on the grounds that the undisputed facts in the case show that fraud had not been committed because all of the elements necessary to constitute fraud were not proven by respondent in the District Court and that in fact, the evidence in this regard was so lacking that the United States District Court should have directed a verdict in favor of the petitioner. The petitioner will further urge that exhibits offered by the petitioner, namely, the death certificate of the insured (A 13) (plaintiff's exhibits 2, 3, 4, 5 and 6) (A 14, 15) which were rejected by the District Court should have been admitted in evidence as bearing upon the question of whether the insured knew that he was suffering from any disease other than bronchial asthma.

The petitioner will also further urge that if there was any proof as to a fraud perpetrated by the insured, that the issue of fact was for the jury and not for the Court.

The petitioner will also urge that this Court reconsider the question of whether the Veterans Administra-

tion had constructive knowledge of the medical reports contained in its own files and to which the insured referred in his application of reinstatement of his insurance. The conflict of the several United States Courts of Appeals of the different circuits on this question falls squarely within the rules of this Court setting forth the reasons for granting a petition for certiorari.

REASONS FOR GRANTING THE WRIT

The petitioner asserts that a writ of certiorari should issue in this case pursuant to Rule 19 (1) (b) of this Court, in that the Court of Appeals below has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, and has decided a federal question in conflict with the applicable decisions of this Court.

The petitioner seeks to raise by this petition for certiorari four questions. First, that the evidence as to the fraud in the reinstatement of the National Service Life Insurance contract does not meet the requirements of the decisions of this Court as to what constitutes fraud. Second, that the District Court erred in directing a verdict for the respondent because if there was any issue of fraud the question of fact in this regard should have been submitted to the jury. Third, that the District Court erred in rejecting the exhibits offered by the petitioner at the trial which consisted of the death certificate, and the medical reports of the insured, all of which were clearly admissible bearing on the question of the intent of the insured in obtaining reinstatement of the National Service Life Insurance policy sued upon. All of these questions were properly raised, and submitted to the Court of Appeals below who did not pass upon any of them, and completely ignored the contentions of the petitioner. Fourth, the petitioner hopes that this Court will also consider the question of whether the Veterans Administration were not required to take notice of the files of the insured

which contained the medical reports by government doctors relied upon for the alleged fraud in the reinstatement of the policy sued upon. This for the reason that on the application for reinstatement the insured specifically referred to this file.

This Court, in the case of Pence v United States, 316 U.S. 332, 86 L.Ed. 1510, and cases cited in the opinion, laid down the rule as to what constitutes fraud in the reinstatement of an insurance policy. At page 338 of the U. S. report, this Court stated that in order to constitute such fraud there must be proof of five things. The elements necessary to prove fraud must show the following:

1. A false representation.
2. In reference to a material fact.
3. Made with knowledge of its falsity.
4. And with intent to deceive.
5. With action taken in reliance upon the representation.

This rule announced in the Pence case, supra, has long since been the rule laid by this Court:

Claflin v Commonwealth Ins. Co., 110 U.S. 81, 28 L.Ed. 76

Lehigh Zinc & I. Co. v Bamford, 150 U.S. 665, 673, 37 L.Ed. 1215

Mutual Life Ins. Co. v Hilton-Green, 241 U.S. 613, 60 L.Ed. 1202

In two opinions of the Solicitor of the Veterans Administration on the question of fraud in the reinstatement of a government insurance policy the Solicitor cited the opinion of this Court in the case of Claflin v Commonwealth Insurance Company, supra, that all five elements were necessary to constitute fraud.

Re: John Frank Vondrak N-12, 192, 524, dated March 24, 1948.

Re: Frank F. Short C-7, 488, 629, N. 3 291 355 dated April 28, 1948.

Therefore it seems that there can be no dispute as to what facts are necessary to constitute fraud in the reinstatement of a National Service Life Insurance policy.

The Court of Appeals in deciding this case below, and indeed the District Court in directing a verdict for the respondent, ignored the decisions of this Court as to what constituted fraud.

Assuming for the moment that the question No. 9 on the form (A 9) as to treatment applied to examinations of government doctors as well as to private physicians then the proof of fraud meets the first element as outlined herein as a false representation, and it would also meet the second requirement in reference to a material fact. But this is as far as the proof of fraud goes to the reinstatement of the policy in question. It does not meet the requirements of number 3 "made with knowledge of its falsity", nor the requirement of number 4 "and with intent to deceive".

The fraud which is charged is the failure to state that the insured had been examined by government doctors whose reports were all contained in the insured's file in the Veterans Administration. There is a total absence of any evidence showing "an intent to deceive" the important element of the alleged fraud.

Herbert, the insured, was suffering from asthma which was service-connected, and he was entitled to reinstate his insurance at any time before January 1, 1950, unless he was totally disabled from his service-connected disability. He did not have to be in the same health as he was on the date of the lapse of his insurance if he was less than totally disabled at the time of the reinstatement.

Title 38 Section 802(c) (2)

The above quoted section provides for the reinstatement of insurance of service men and women who were suffering from service-connected disabilities and who were less

than totally disabled at any time prior to January 1, 1950. It is undisputed that Herbert, the insured in this case, was never rated totally disabled, but on the date of the reinstatement was 60% disabled from asthma. The Veterans Administration knew this because the premiums paid on the reinstated policy were deducted from his compensation payments. The answer filed on behalf of the respondent admits this. (Par. 2 of answer A. 4).

The one element of fraud upon which there was no proof submitted by the respondent is number 4 "And with intent to deceive". Fraud is predicated upon the ground that one of the medical reports made by governmental doctors indicated that in addition to the disability of asthma the insured was suffering from cirrhosis of the liver. If these medical reports relied upon by the respondent showed a condition only of asthma for which the insured had service connection, there could not possibly be any fraud in the case. He is charged with having knowledge that he was also suffering from cirrhosis of the liver. But there is no evidence in the case that Herbert ever knew that he had this disability. The evidence is to the contrary. The respondent's own medical witness testified (A 25) he was not told what they had found upon their examinations. Testimony further offered showed that persons may be suffering from cirrhosis of the liver and not know that they have the disability.

The death certificate offered in evidence but rejected by the Court (A 13) showed that cirrhosis of the liver existed only "for months". The death certificate shows that the insured died on November 20, 1951, over three years and some seven months after the reinstatement of the policy in question on April 26, 1948.

The insured, Herbert, gave his correct C-number of his claim in the Veterans Administration for compensation in which the medical reports in question were filed. This, of itself, shows that there was no intent on the part of the insured to deceive.

It had long since been the practise of the Veterans Administration where an application for reinstatement of insurance was received which contained a C-number that the office forwarding the application should review the compensation file. This order was issued as early as June 9, 1926 (Circular No. 367 Adjudication Service). In Circular No. 419 Medical Service issued March 30, 1927 it was provided that in any case where a person applied for the reinstatement of his government insurance there should be a search to ascertain the existence or non-existence of a claims file.

The form for the reinstatement of insurance used by the insured in this case was the form first adopted by the Veterans Administration, and contained the question as to whether the applicant had applied for compensation and to give the C-number for the very express purpose of carrying out the orders as to searching the compensation folders in insurance cases. The Veterans Administration has now at this late date changed the form for reinstatement of insurance leaving out the question as to compensation.

According to the opinion of the Court below, the question relative to compensation, and the giving of the compensation claim's file number served no useful purpose. The fact is that they were definitely asked to comply with the orders regarding the information desired in reinstatement cases and it is little short of ridiculous to make any other contention.

Furthermore, how could there be any intent to deceive when the insured pointed out to the officials of the Veterans Administration the very file which contained the medical reports made by their own staff which included the facts upon which they rely to constitute the fraud in this case.

Since the decision of the Court of Appeals below affirming the judgment of the District Court is in direct conflict with the decisions of this Court on this ground alone, this petition for certiorari should be granted.

The second ground upon which this petition for certiorari is predicated is that the District Court erred in directing a verdict for the respondent. The issue, if any, was one of fact, and the District Court should have submitted the case to the jury.

In this connection the decision of the Court of Appeals below conflicts with the decision of the Eighth Circuit Court of Appeals in the case of Jones v United States, 112 F.2d 282 in which the Court of Appeals held that the issue of fraud should have been submitted to the jury. See also the case of Bailey v United States, 92 F.2d 456 where the Court of Appeals held that the issue of fraud was for the jury. The proof of fraud in both of these cases was much stronger than the evidence submitted by the respondent in this case.

The petitioner also asserts that the District Court clearly erred in refusing to admit in evidence the death certificate which showed that the disability of cirrhosis existed only for "months" prior to death. This had a bearing on whether the insured knew he was suffering from this disability some three years and seven months prior thereto. Also the District Court erred in refusing to permit the introduction in evidence of exhibits petitioner's exhibits Nos. 2, 3, 4, 5 which showed that the only treatment which the insured received in May, June and July, 1949 was for his disability of asthma. All of these exhibits had a bearing on what knowledge the insured had that he was suffering from the disability of cirrhosis and whether there was any intent to deceive at the time he applied for reinstatement.

Lastly the petitioner again raises the question of the conflict of the United States Court of Appeals on the question of placing on the application for reinstatement the claim number of the insured's compensation claim in

his file. Two Courts of Appeals have held that this constituted a notice to the Veterans Administration.

United States v Kelley, 136 F.2d 823, 9th CCA
Clohesy v United States, 199 F.2d 475, 7th CCA

Please refer to the opinion of the Distinguished Jurist Youngdahl, formerly Governor of Minnesota, in the case of Thompson v United States, 109 Fed. Supp. 283 construing these cases. The decisions in these cases cannot be reconciled with the decision of the Court of Appeals below in this case, and expressly their prior decision. It may now be contended that the Insurance Division of the Veterans Administration is separate and apart from the compensation section that it cannot have any knowledge of what is contained in a compensation file. This statement, if made, would be utterly false and particularly in this case where the insurance premiums were deducted from the insured's compensation. The compensation file had to be examined in order to determine if premiums could be deducted from the payments of compensation made to the insured.

CONCLUSION

In some thirty-five years of experience in litigation on government insurance policies, thirteen years of which was with the government in which counsel's time was entirely devoted to suits on insurance contracts, and during which time counsel tried these suits in some forty United States District Courts, and briefed and argued these cases in all of the eleven Circuit Courts of Appeals, I have never seen or found any case where the Courts have totally ignored the decisions of this Court, as to what constitutes fraud or have failed to properly evaluate the evidence as to what constitutes fraud. The decision of the Court of Appeals stands out alone as establishing a new rule of law that it is not necessary to show any proof as to the intent

of the insured but that fraud alone may be predicated upon a wrong answer to a question asked when the answers to the other questions such as giving the compensation number clearly show that there was never any intent to deceive. The medical reports relied upon for the fraud being contained in the file specifically referred to in the application for reinstatement. The decision of the Court of Appeals below is a gross miscarriage of justice, and this Court in its supervisory powers should grant this petition,

WHEREFORE, the petitioner prays that a writ of certiorari directed to the United States Court of Appeals for the District of Columbia Circuit be granted in this case, and that upon a review of the record that the judgment in favor of the respondent be in all things reversed, and this cause be remanded for further proceedings in accordance with the orders of this Court.

Respectfully submitted,

CLAUDE L. DAWSON
Attorney for the Petitioner
1049 Shoreham Bldg.
Washington 5, D. C.

APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Filed May 8, 1958. Joseph W. Stewart, Clerk.

No. 14062

HELEN M. KIEFER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

Decided May 8, 1958

Mr. Claude L. Dawson for appellant.

Mr. Robert S. Green, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Messrs. Oliver Gasch*, United States Attorney, and *Samuel D. Slade*, Attorney, Department of Justice, were on the brief, for appellee. *Messrs. Paul A. Sweeney*, Attorney, Department of Justice, and *Lewis Carroll*, Assistant United States Attorney, also entered appearances for appellee.

Before BAZELON, WASHINGTON and DANAHER, Circuit Judges.

PER CURIAM: In a former appeal in this suit for benefits under a National Service Life Insurance policy, we held that the District Court erred in barring the United States from the defense of fraud on the ground that the

fraud was not relied upon in reinstating the deceased ex-serviceman's policy.[1] Because of this error, the District Court did not consider whether the false representations were made with knowledge of their falsity and with intent to deceive. We therefore remanded the case "to afford the parties an opportunity to litigate that issue . . . ."

Pursuant to the remand, a jury trial was had at which cross-motions for directed verdicts were filed at the conclusion of the evidence. The District Court granted the motion of the United States. We think the record fully supports this action.

Affirmed.

---

[1] *United States* v. *Kiefer*, 97 U.S.App.D.C. 101, 228 F. 2d 448 (1955), *cert. denied*, 350 U.S. 933 (1956).

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

April Term, 1958.

C. A. 170-54

No. 14,062

Helen M. Kiefer, Appellant,

v.

United States of America, Appellee.

Filed May 8, 1958. Joseph W. Stewart, Clerk.

APPEAL FROM the United States District Court for the District of Columbia.

Before: BAZELON, WASHINGTON and DANAHER, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court apealed from in this cause be, and the same is hereby, affirmed.

Dated: May 8, 1958.

Per Curiam.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 116, both inclusive, constitute a true copy of the joint appendix and portions of the record, designated by counsel for appellant, in the foregoing designation, in the case of:

Helen M. Kiefer, Appellant,

v.

United States of America, Appellee

No. 14,062, April Term, 1958, as the same remain upon the files and records of said Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this sixth day of June, A.D. 1958.

[SEAL]

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 22 1958
JAMES R. BROWNING, Clerk

No. 205

In the Supreme Court of the United States

OCTOBER TERM, 1958

HELEN M. KIEFER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

SAMUEL D. SLADE,
ROBERT S. GREEN,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	3
Argument	8
Conclusion	17

CITATIONS

Cases:

Bailey v. *United States*, 92 F. 2d 456	9
Brown v. *United States*, 102 F. Supp. 132	15
Claflin v. *Commonwealth Ins. Co.*, 110 U.S. 81	12, 14
Clarke v. *United States*, 102 F. Supp. 338	15
Clohesy v. *United States*, 199 F. 2d 475	14
Columbian Nat. Life Ins. Co. v. *Rodgers*, 93 F. 2d 740	12, 13
Danaher v. *United States*, 181 F. 2d 673	10, 11, 12, 13
Fountain & Herrington, Inc. v. *Mutual Life Ins. Co.*, 55 F. 2d 120	11
Ginsburg v. *Pacific Mutual Life Ins. Co.*, 89 F. 2d 158, certiorari denied, 302 U.S. 708	11
Halverson v. *United States*, 121 F. 2d 420, certiorari denied, 314 U.S. 695	11
Jones v. *United States*, 106 F. 2d 888	14, 16
Jones v. *United States*, 112 F. 2d 282	9
Kavakos v. *Equitable Life Assur. Soc.*, 88 F. 2d 762	12
Lyttle v. *Pacific Mut. Life Ins. Co.*, 72 F. 2d 140	12
McDaniel v. *United States*, 196 F. 2d 291	10, 12, 13, 14
Meadors v. *United States*, 118 F. Supp. 277, affirmed, 219 F. 2d 138	12
Mutual Life Ins. Co. v. *Hilton-Green*, 241 U.S. 613	12
Mutual Life Ins. Co. of New York v. *Hurni Packing Co.*, 260 Fed. 611, certiorari denied, 251 U.S. 556	11
Nonantum Inv. Co. v. *Maryland Casualty Co.*, 56 F. 2d 329	12

Cases—Continued Page

Pence v. *United States*, 316 U.S. 332 ..... 9, 11, 12, 13
Raives v. *Raives*, 54 F. 2d 267 ..... 11, 12
United States v. *Cooper*, 200 F. 2d 954 ..... 14, 16
United States v. *Depew*, 100 F. 2d 725 ..... 10, 11, 13, 15
United States v. *Elliott*, 73 F. 2d 374, certiorari denied, 295 U.S. 740 11
United States v. *Kelley*, 136 F. 2d 823 15
United States v. *Kiefer*, 228 F. 2d 448, certiorari denied, 350 U.S. 933 ..... 6, 7, 14
United States v. *Nero*, 248 F. 2d 16 ..... 15, 16
United States v. *Pink*, 315 U.S. 203 4
United States v. *Riggins*, 65 F. 2d 750 15
United States v. *Willoughby*, 250 F. 2d 524 15

Statutes:

National Service Life Insurance Act of 1940 (38 U.S.C. 801, *et seq.*):
Section 802(w) 2
Section 808 2
38 U.S.C. 802(c)(2) 15, 16
38 U.S.C. 802(y) 16

Miscellaneous:

38 C.F.R. 8.24 13
Veterans Administration Regulation 3423 (12 F.R. 7116 (1947)), as amended (13 F.R. 181 (1948)):
Section 10.3423 ..... 2, 3
Section 10.3423(a) 3
Section 10.3423(b) 3
Veterans Administration Regulation 3424 (38 C.F.R. (1946 Supp.) Section 10.3424), as amended (13 F.R. 657 (1948)) 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 205

HELEN M. KIEFER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The United States District Court for the District of Columbia entered no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit on the first appeal in this case is reported at 228 F. 2d 448, and certiorari was denied by this Court at 350 U.S. 933. The opinion on the second appeal (Pet. 13-14) is reported at 255 F. 2d 189.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered May 8, 1958 (Pet. 15). The petition for a writ of certiorari was filed July 23, 1958. The jurisdiction of this Court is presumably invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether both courts below were correct in holding that the United States had established that the insured obtained reinstatement of his policy of National Service Life Insurance by fraud.

STATUTE AND REGULATIONS INVOLVED

In pertinent part, the National Service Life Insurance Act of 1940 (38 U.S.C. 801, *et seq.*) provides as follows (as it appears in the United States Code):

Section 802.

* * * *

(w) *Incontestability of policies.*

Subject to the provisions of section 812 of this title, all contracts or policies of insurance before or after August 1, 1946, issued, reinstated, or converted shall be incontestable from the date of issue, reinstatement, or conversion except for fraud, nonpayment of premium, or on the ground that the applicant was not a member of the military or naval forces of the United States.

* * * *

Section 808. *General administrative provisions.*

The Administrator, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this subchapter, shall have power to make such rules and regulations, not inconsistent with the provisions of this subchapter, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. * * *

Veterans Administration Regulation 3423 (12 F.R. 7116 (1947)), as amended (13 F.R. 181 (1948)), and 3424 (38 C.F.R. (1946 Supp.) Section 10.3424),

as amended (13 F.R. 657 (1948)), provide in pertinent part as follows:

> Section 10.3423—*Health Requirements:* National Service Life Insurance or any plan may be reinstated if application and tender of premiums are made:
>
> (a) On or before July 31, 1948, or within three months after lapse, whichever is later, provided the applicant be in as good health on the date of application and tender of premiums as he was on the due date of the premium in default and furnishes evidence thereof satisfactory to the Administrator.
>
> (b) Subsequent to July 31, 1948, and after expiration of the three-month period mentioned in paragraph (a) of this section, provided applicant is in good health (§ 10.3401) on the date of application and tender of premiums, and furnishes evidence thereof satisfactory to the Administrator of Veterans' Affairs.
>
> Section 10.3424—*Application and medical evidence* * * * Applicant's own statement of comparative health may be accepted as proof of insurability for the purpose of reinstatement under § 10.3423(a), but, whenever deemed necessary in any such case by the Administrator, report of physical examination may be required. * * *

STATEMENT

Petitioner sued, as sole beneficiary, for benefits under her deceased brother's National Service Life Insurance policy (I J.A. 2).[1] The Government con-

---

[1] References (I J.A. ——) are to the joint appendix in the Court of Appeals on the first appeal in this case and references (II J.A. ——) are to the joint appendix on the second

tested the policy on the ground of fraud, alleging that the insured's policy had been reinstated in 1948 in reliance upon an application which falsely represented his comparative health (I J.A. 13-14). The insured had answered questions 8, 9, and 10 of this application as follows (I J.A. 16-17):

> 8. Are you now in as good health as you were on the due date of the first premium in default? [x] Yes [ ] No.
>
> 9. Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since lapse of this insurance? [ ] Yes [x] No. (If "Yes," give all dates and full particulars below.).
>
> 10. Have you ever applied for disability compensation, retirement pay, pension or waiver of insurance premiums? [x] Yes [ ] No. (If "yes," give Claim No. below.) C-No. 5 241 066.

The insured's disability claim file, the number of which he listed in answer to question 10, indicated that he had been discharged from the Army in 1945 on a certificate of disability for bronchial asthma, and was granted a 60 percent disability compensation, for which a claim number was assigned (I J.A. 11). The file showed that from August 1945 through February 13, 1948, the insured had received occa-

---

appeal; both form part of the record in this Court, either on this Petition or on the Petition in No. 518, October Term, 1955. (Cf. *United States* v. *Pink*, 315 U.S. 203, 216.

sional treatment and hospitalization for chronic bronchial asthma and certain minor conditions, including mild hypertension and nephritis (I J.A. 11-12, 18-37). On March 16, 1948, he was recommended for emergency hospitalization by Dr. Norman E. Marsh, Veterans Administration consulting physician, who reported as follows (I J.A. 39):

> **Brief History:** Prostration, abdominal distension, nausea and vomiting. Has consumed large quantities of liquor during last 6 mos.
> Physical Findings: Extreme enlargement of liver.
> **Diagnosis:** Prob. Cirrhosis of liver.

The insured was thereupon immediately admitted to the United States Naval Hospital, Corona, California, where the diagnosis of cirrhosis of the liver was confirmed, with the notation that the patient had been "drinking steadily for 6 months about a quart a day. His liver is down to his iliac crest. He has been nauseated and vomiting for some time. No food for 36 hours." (I J.A. 40-44). This emergency hospitalization, which lasted nearly a month, occurred immediately prior to the reinstatement application in April 1948, in which the insured represented that his comparative health had not changed since the date of lapse and that he had not been ill nor consulted a physician at home or at a hospital during the period of lapse.

In November 1951, the insured was again examined for emergency hospitalization, and admitted to the Veterans Administration Hospital, Long Beach, California, where he died on November 20, 1951. The

final diagnosis was "1. Metabolic alkalosis, prerenal azotemia due to prolonged vomiting, cause unknown but probably due to acute alcoholism. 2. Cirrhosis of the liver" (I J.A. 52-54).

Subsequent to the death of the insured, the Veterans Administration assembled all of his records in order to determine what death benefits were payable to his account. At this time his insurance records, which had previously been in the files of the Insurance Service, and his compensation records, always in the files of the Compensation Service, were for the first time brought together and compared, and the discrepancy with respect to comparative health discovered. Upon the refusal of the Veterans Administration to pay on the policy, petitioner brought this action.

The District Court initially awarded summary judgment to petitioner, ruling that the insured, by disclosing his "C" number in answer to question number 10 on the application for reinstatement (*supra*, p. 4), precluded the Government as a matter of law from claiming reliance on the false representations (I J.A. 13-14). The Court of Appeals for the District of Columbia Circuit reversed, holding that there was no evidence that the Insurance Service ever had actual knowledge of the contents of the insured's disability compensation file, and that in the circumstances of this case it could not be charged with constructive knowledge thereof. *United States* v. *Kiefer*, 228 F. 2d 448. Concluding that the District Court had erred in its view of the applicable law with respect to the element of reliance, the Court of Appeals re-

manded the case for trial in order to determine whether all of the elements of fraud were in fact present (228 F. 2d at 452). The petitioner sought review of that issue in this Court, but her petition for a writ of certiorari was denied (350 U.S. 933).

A jury trial was held in the District Court on March 13 and 14, 1957. The medical evidence referred to above was introduced into evidence, and the depositions of three doctors who had attended the insured during the period prior to the second reinstatement of his insurance were read by Government counsel (II J.A. 21-58). None of these doctors had any independent recollection of the insured, and their testimony was therefore confined to a discussion of the material in their records and the answering of hypothetical questions. In addition, the Director of Medical Service of the Veterans Administration and a Technical Advisor, Department of Insurance, Veterans Administration, testified for the Government (II J.A. 58, 82). Petitioner's only witness was one Thomas E. Carter, a section chief in the Veterans Claims Division of the Veterans Benefits Office, who appeared in response to a subpoena served upon the Administrator of Veterans Affairs, and testified as to the procedures followed in handling veterans' claims (II J.A. 101). Petitioner offered in evidence the insured's death certificate, which was received as Plaintiff's Exhibit No. 1 for the limited purpose of proving the death of the insured (II J.A. 104). The court refused, however, to receive this exhibit for the purpose of proving how long the insured had suffered from

cirrhosis of the liver, and likewise excluded Plaintiff's Exhibits 2 through 6, which related to medical treatment given the insured subsequent to the date of his April, 1948 application for reinstatement. (II J.A. 104, 109, 110). At the conclusion of the evidence, both parties moved for directed verdicts (II J.A. 111). The District Court granted the Government's motion, and verdict and judgment were entered for the United States (II J.A. 111).

On appeal, the same panel of the Court of Appeals that had heard the earlier appeal in this case, held, in a *per curiam* decision (Pet. 13-14), that "the record fully supports" the action of the District Court in granting the motion of the United States for a directed verdict, and accordingly affirmed the judgment.

ARGUMENT

This case presents no occasion for review by this Court. The disposition in the courts below turned upon the particular facts of this case, and, as we shall show, the uncontroverted evidence left the District Court with no alternative but to direct a verdict for the United States. Petitioner's allegations of a conflict of decisions are meritless; the only significant legal question in this case—whether the Government was precluded as a matter of law from relying upon the insured's deliberate misrepresentations—was disposed of on the first appeal of the case, and further review was properly denied by this Court. That decision was fully in accord with decisions of the Fifth, Sixth and Seventh Circuits, and its rationale has since been expressly adopted by the Second and Ninth

Circuits. Petitioner's other contentions are equally without merit, and raise no issues for this Court's consideration.

1/ The uncontradicted facts before the District Court clearly established each of the essential elements of fraud in the reinstatement of the insured's policy of National Service Life Insurance—" * * * (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation." *Pence* v. *United States*, 316 U.S. 332, 338. Petitioner failed to produce a scintilla of evidence to rebut this clear showing and accordingly, as in the *Pence* case, the District Court properly directed a verdict for the United States.[2]

---

[2] The question of the propriety of a directed verdict on the issue of fraud depends, of course, upon the circumstances of the particular case. As we shall show, *infra*, pp. 10-14, the uncontroverted evidence here plainly required a directed verdict for the United States; accordingly the two decisions which petitioner cites for the proposition that the issue of fraud here was for the jury—*Jones* v. *United States*, 112 F. 2d 282 (C.A. 8) and *Bailey* v. *United States*, 92 F. 2d 456 (C.A. 5)—are plainly inapposite. Thus, in the *Jones* case, unlike the present situation, there was a clear conflict of evidence which presented controverted issues of fact. The court there stated (112 F. 2d at 286):

> There was a sharp conflict in the substantial evidence on each side relative to the state of health of the insured at the time of the reinstatement of the policies and as to his knowledge thereof at such time. Therefore the case should have been submitted to the jury for determination.

The *Bailey* case is likewise distinguishable, in that the district court in that case had erroneously held that false state-

a. The insured's medical history conclusively demonstrates the falsity of his representations of comparative health. Despite his statements in his application of April 26, 1958, that he was then in as good health as he was on the due date of the first premium in default (here September, 1947), and had not been ill or received medical treatment since that date, the records show that from March 16, 1948 to April 9, 1948 the insured had received emergency hospitalization for cirrhosis of the liver, a serious ailment and one not previously mentioned in his medical history. The medical experts testified at the trial that the insured "was considerably ill at that time" (II J.A. 51, 52), and "seriously in need of hospitalization or at least medical treatment" (II J.A. 63). Thus, his representations in his application were demonstrably false.

b. These representations are clearly material, dealing as they do with the applicant's health and providing the sole basis for reinstatement of his insurance. The very purpose of the question was, of course, to elicit material information, *United States* v. *Dopear*, 100 F. 2d 725 (C.A. 10); the health of the appli-

---

ments were fraudulent irrespective of whether the applicant knew of their falsity or intended to deceive. The Court of Appeals for the Fifth Circuit held that, in the circumstances of that case, these issues, as well as the question of the falsity of the representations, were for the jury. The Fifth Circuit has since expressly held that a directed verdict is proper in a case which was in every material respect identical with the present one. *McDaniel* v. *United States*, 196 F. 2d 291 (C.A. 5). See also *Danaher* v. *United States*, 181 F. 2d 673 (C.A. 8).

cant is of vital importance to the insurer, and representations as to consultations with physicians or treatment for serious ailments are held to be material as a matter of law. *United States* v. *Dopew*, *supra*; *Dunahoe* v. *United States*, 181 F. 2d 673 (C.A. 8); *Raines* v. *Raines*, 54 F. 2d 267 (C.A. 2); *Halverson* v. *United States*, 121 F. 2d 420 (C.A. 7), certiorari denied, 314 U.S. 695; cf. *Penn* v. *United States*, 316 U.S. 332, 339. Particularly is this true where, as here, reinstatement of the applicant's insurance was made without a physical examination, and solely on the basis of his own statements as to his comparative health.

c. The applicant obviously knew he was answering these questions falsely. The information requested was necessarily within his own knowledge, and there is "no room for doubt" that he was aware of the falsity of his answers. *United States* v. *Elliott*, 73 F. 2d 374 (C.A. 5), certiorari denied, 295 U.S. 740. Thus, despite his disclaimer of medical treatment, his medical history discloses, not merely casual physical examinations or medical consultations, but emergency hospitalization for a period of more than

---

[3] In any event, false representations are material if, had the true facts been disclosed, they would be regarded as substantially increasing the chance of loss, or if a careful insurer would have refused reinstatement or would have made a further study of the risk involved. *Mutual Life Ins. Co. of New York* v. *Hurni Packing Co.*, 260 Fed. 641 (C.A. 8), certiorari denied, 251 U.S. 556; *Fountain & Harrington, Inc.* v. *Mutual Life Ins. Co.*, 55 F. 2d 120 (C.A. 1); *Ginsburg* v. *Pacific Mutual Life Ins. Co.*, 89 F. 2d 158 (C.A. 2), certiorari denied, 302 U.S. 708.

three weeks, just a short time prior to the filing of his application for reinstatement. Nor could the applicant have failed to know that he was ill. He had been brought to the hospital by ambulance as an emergency patient suffering from "prostration, abdominal distension, nausea and vomiting" (I J.A. 39, 40-44). The committing physician, Dr. Marsh, stated that as a result of the insured's symptoms "he should realize that he was a pretty sick man" (II J.A. 33). It is inconceivable that only three weeks later the insured could have forgotten this extended hospitalization and these severe symptoms. To the contrary, the only possible conclusion is that he knew he was answering questions 8 and 9 falsely. *Danaher* v. *United States*, 181 F. 2d 673, 676 (C.A. 8); *McDaniel* v. *United States*, 196 F. 2d 291 (C.A. 5); *Meadors* v. *United States*, 118 F. Supp. 277 (E.D. Ky.), affirmed, 219 F. 2d 438 (C.A. 6). And, of course, since the insured knowingly made false answers to material questions in his application for reinstatement, the requisite intent to defraud is presumed as a matter of law; there is no necessity for further proof of actual conscious design to deceive. *Kavakos* v. *Equitable Life Assur. Soc.*, 88 F. 2d 762 (C.A.D.C.), and cases cited therein; *Claflin* v. *Commonwealth Ins. Co.*, 110 U.S. 81; *Mutual Life Ins. Co.* v. *Hilton-Green*, 241 U.S. 613; *Pence* v. *United States*, 316 U.S. 332; *Raives* v. *Raives*, 51 F. 2d 267 (C.A. 2); *Nowantony Ins. Co.* v. *Maryland Casualty Co.*, 56 F. 2d 329 (C.A. 1); *Lytle* v. *Pacific Mut. Life Ins. Co.*, 72 F. 2d 140 (C.A. 6); *Columbian*

Nat. Life Ins. Co. v. *Rodgers*, 93 F. 2d 740 (C.A. 10).[1]

d. Finally, there is no question but that the Veterans Administration in fact relied upon the insured's representations in reinstating his insurance. The applicable regulations provided that an applicant's "own statement of comparative health may be accepted as proof of insurability for the purpose of reinstatement" (38 C.F.R. 8.24), and it is indisputable that the Veterans Administration in fact accepted the insured's representations at their face value and without further investigation reinstated his insurance. See testimony of Edgar J. Mason (II J.A. 82-91). Indeed, an insurer is presumed as a matter of law to have relied upon the truthfulness of material representations. *United States* v. *Dopar*, 100 F. 2d 725 (C.A. 10); *Daugher* v. *United States*, 184 F. 2d 673 (C.A. 8); see *Columbian Nat'l Life Ins. Co.* v. *Rodgers*, 93 F. 2d 740 (C.A. 10); cf. *Ponce* v. *United*

[1] Contrary to petitioner's contention, the insured's listing of his C-Number in answer to question 10 in no way demonstrates that his answers to questions 8 and 9 were not wilfully false or were made without intent to deceive. For the insured's C-Number referred only to his disability compensation claim for bronchial asthma, an ailment which was completely unrelated to his liver condition (see, *e.g.*, testimony of Dr. Mueller, II J.A. 58-62), and he had no reason whatever to assume that information as to the latter illness would find its way into his C-file. Moreover, as the Fifth Circuit held in rejecting precisely this argument "no amount of casuistry short of that which would make black seem white, the false true, can explain away or justify the false answers the insured deliberately gave". *McDaniel* v. *United States*, 196 F. 2d 291, 294 (C.A. 5).

States, 316 U.S. 332. As this Court said in *Claflin* v. *Commonwealth Ins. Co.*, 110 U.S. 81, 95: "[T]he law presumes every man to intend the natural consequences of his acts. No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed".

2. Petitioner's other contentions are obviously without merit, and raise no issue for this Court's review.

a. Although petitioner does not challenge the fact that this insurance was reinstated in reliance upon the insured's answers to questions 8 and 9 in the application, she nevertheless attempts to reargue the issue involved in the previous appeal in this case, claiming that since the insured listed his C-Number on his application, and his C-file contained information demonstrating the falsity of these representations, the Insurance Service of the Veterans Administration was precluded as a matter of law from relying upon them. This question was carefully examined by the Court of Appeals for the District of Columbia Circuit in the first appeal in this case, 228 F. 2d 448, certiorari denied, 350 U.S. 933, and squarely resolved against petitioner. As we demonstrated in our Brief in Opposition to the Petition for a Writ of Certiorari on this question (No. 518, October Term, 1955), that decision was clearly correct and fully in accord with the applicable decisions. See, *e.g.*, *McDaniel* v. *United States*, 196 F. 2d 291 (C.A. 5); *United States* v. *Cooper*, 200 F. 2d 954 (C.A. 6); *Clohesy* v. *United States*, 199 F. 2d 475 (C.A. 7); *Halverson* v. *United States*, 121 F. 2d 420 (C.A. 7), certiorari denied, 314 U.S. 695; *Jones* v.

United States, 106 F. 2d 888 (C.A. 5); *Brown* v. *United States*, 102 F. Supp. 132 (W.D. Mo.); *Clarke* v. *United States*, 102 F. Supp. 338 (E.D. Mo.); cf. *United States* v. *Depew*, 100 F. 2d 725 (C.A. 10); *United States* v. *Riggins*, 65 F. 2d 750 (C.A. 9). Moreover, since that time, this decision of the District of Columbia Court of Appeals has been expressly adopted by the Courts of Appeals for the Second and Ninth Circuits in *United States* v. *Nero*, 248 F. 2d 16 (C.A. 2), and *United States* v. *Willoughby*, 250 F. 2d 524 (C.A. 9).[5]

b. Equally without substance is petitioner's contention (Pet. 7) that the insured was entitled to reinstatement of his policy of National Service Life Insurance under the provisions of 38 U.S.C. 802 (c)(2), which states *inter alia*, that the Administrator shall not deny, for the purposes of such reinstatement, "that the applicant is in good health because of any disability or disabilities, less than total in degree, resulting from or aggravated by such active service." In the first place, the ill health which the insured concealed was not a disability "resulting from or aggravated by" his active service; to the contrary, the record makes clear that the symptoms he failed to report were those of cirrhosis of the liver, apparently the result of prolonged drinking, and clearly in no way related to his service-

[5] The *Willoughby* decision "easily distinguished" *United States* v. *Kelley*, 136 F. 2d 823 (C.A. 9), the case upon which petitioner primarily relied in seeking certiorari in No. 518, and in urging further review of the issue here. 250 F. 2d at 531-532.

connected bronchial asthma. Moreover, even if the insured's illness was service-connected or service-aggravated, he could not obtain reinstatement under Section 802(c)(2) unless an application based on the grounds set forth in that Section had been presented to and passed upon by the Administrator of Veterans Affairs. See, *e.g.*, *United States* v. *Nero*, 248 F. 2d 16 (C.A. 2); cf. *United States* v. *Cooper*, 200 F. 2d 954 (C.A. 6); *Jones* v. *United States*, 106 F. 2d 888 (C.A. 5). The insured, however, applied for reinstatement[7] on a comparative health basis, and it was on these terms that the Administrator processed the application and approved reinstatement of the policy. Plainly this application cannot now form the basis of a claim of entitlement to reinstatement under Section 802(c)(2).[6]

---

[6] The Court of Appeals in the *Nero* case rejected precisely this contention, stating (248 F. 2d at 18):

> The Administrator determined that Nero was eligible for reinstatement under § 802(y), and since the Administrator has never taken any action with respect to whether Nero was entitled to reinstatement under § 802(c)(2), the decision of the trial court that reinstatment was mandatory under 802(c)(2) was error. *Scott* v. *United States*, 189 F. 2d 863 (5 Cir. 1951). An application for one type of reinstatement cannot be treated by the District Court as an application for another type of reinstatement. Cf. *United States* v. *Cooper*, 200 F. 2d 954 (6 Cir. 1953); *Jones* v. *United States*, 106 F. 2d 888 (5 Cir. 1939).

[7] Section 802(y), providing for reinstatement on a comparative health basis, was repealed in 1917 (61 Stat. 6) but similar provisions were promulgated in the Administrator's regulations, *supra*, p. 3, upon which the insured's application here was based.

c. Finally, petitioner asserts as error the refusal of the district court to admit evidence as to the health of the insured subsequent to the date of his fraudulent misrepresentations in his application for reinstatement. It is perfectly clear, however, that this evidence is completely immaterial to the question at issue, *i.e.*, the intent of the insured at the time he submitted his application for reinstatement, and that it was therefore properly excluded.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Assistant Attorney General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
ROBERT S. GREEN,
Attorneys.

AUGUST, 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958 478602 185

FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 18 1958
JAMES R. BROWNING, Clerk

No. 205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

HELEN M. KIEFER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

REPLY BRIEF TO THE BRIEF OF THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

CLAUDE L. DAWSON,
Attorney for the Petitioner,
1049 Shoreham Building,
Washington 5, D. C.

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	PAGE
3401. Definition of Good Health (August 1, 1946)	3
Title 38 U.S.C. (Sec. 802(c)(2)	3
Excerpts of Testimony from the Record:	
(A.23) Dr. Carl L. Eckhardt	4
(A.24) " "	4
(A.25) " "	5
(A.26) " "	5

Cases Cited

Pence v. United States, 316 U.S. 332	7

No. 205

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

HELEN M. KIEFER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

REPLY BRIEF TO THE BRIEF OF THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

It is deemed necessary to file this reply brief. The reason being that the brief of the Solicitor General and his subordinates contains half truths and many misleading statements which only have a tendency to confuse this Court.

The true facts in this case are very simple. The insured, George N. Herbert, while in the military service applied for $10,000 National Service Life Insurance. He paid premiums until January, 1946. He applied for reinstatement of only $5000 of insurance on October 3, 1946,

and paid premiums through August, 1947. He again applied for reinstatement of $5000 of the insurance on April 26, 1948, and premiums were deducted from his compensation payments until the date of his death.

Herbert incurred an aggravation of a disability of Asthma while in the service, and he was rated and being paid for 60% disability at the time he last reinstated, and in fact, until the date of his death.

When he applied for reinstatement of insurance in answer to a question he gave his correct C-Number which related to his claim for compensation. The government continued to deduct premiums from his compensation payments for nearly three and one-half years. The date of his death was November 20, 1951.

When he died the Veterans Administration claimed that he had committed fraud because he did not state he had received treatment by government Doctors. The examinations of these physicians were all contained in his C-file to which he had referred in his application for reinstatement. The Court below held that the Veterans Administration did not have to take notice of their own files, and this despite the fact that the premiums which the insured was paying were deducted from the compensation payments, evidence of which could only be clearly ascertained by resort to the compensation folder.

On page 2 and 3 of the Respondent's brief there is quoted a portion of the regulations of the Veterans Administration covering reinstatement of National Service Life Insurance policies. The counsel for the respondent has not printed the regulations in full they left out and curtailed the provisions of the regulations relating to persons applying for reinstatement in the same class as Herbert who was suffering from a service incurred disability. The following was left out:

"3401. DEFINITION OF GOOD HEALTH

(A) the words "good health", when used in connection with insurance, mean that the applicant is, from clinical or other evidence, free from disease, injury, abnormality, infirmity, or residual of disease or injury to a degree that would tend to weaken or impair the normal functions of the mind or body or to shorten life.

(B) The existence of "good health" shall not be denied in connection with any application for reinstatement of insurance, or for new insurance if such application is submitted prior to January 1, 1950, and if the disability or disabilities, less than total in degree, resulted from or were aggravated by active military or naval service between October 9, 1940, and September 2, 1945, both dates inclusive. (3401—August 1, 1946)

Reinstatement of the $5000 insurance policy Herbert applied for was entitled to be granted on the following statutory authority:

Title 38 U.S.C.

Section 802(c)(2) provides, among other things, that:

"* * * any individual who has had active service between October 8, 1940, and September 2, 1945, both dates inclusive, shall be granted such insurance upon application therefore in writing and upon payment or authorization for deduction of premiums and evidence satisfactory to the Administrator showing such person to be in good health at the time of such application. In any case in which application for life or disability insurance or for reinstatement of such insurance is made prior to January 1, 1950, the Administrator shall not deny, for the purposes of this Section or Sections 803-805, 806-818 of this title, that the applicant is in good health because of any disability or disabilities, less than total in degree, resulting from or aggravated by such active service. * * *". (Emphasis supplied)

From the foregoing this Court will note that even though Herbert had a 60% disability from Asthma he was entitled to reinstate his insurance any time before January 1, 1950. This was true even though the disability of Asthma had been of a much more severe degree from the date of the lapse of the insurance in August, 1947. He still could have reinstated at the time that he did because at no time was he ever rated totally disabled by the Veterans Administration for compensation purposes. So in considering this case, the disability of Asthma must be ruled out.

The contents and findings of the examinations made by Government Doctors which were contained in his C-file were never disclosed to him.

Dr. Carl L. Eckhardt (A.21) was one of the government physicians who examined him. He was one of the witnesses upon whom the government relied to prove fraud in the reinstatement. This Doctor examined him on February 10-20, 1948. (A.52) He testified, in part, as follows:

(A.23) "Q. From this report as you read it, sir, and considering your normal style of making reports of this nature at the time, could you say whether the veteran, at the time of this examination, was a relatively sick man or not? A. He was, from the standpoint of bronchial asthma.

"Q. Could you say whether he was a substantially sick man from the point of view of any other diagnosis other than bronchial asthma? A. No.

(A.24) "Q. What I am particularly interested in finding out is: Considering the patient's general objective physical condition being one of a person who has come in with a complaint, now can you say whether the basis of this man's awareness that he is not well was that basis primarily in the asthma or was it substantially caused by the nephritis and hypertension? A. It was by the asthma.

"Q. Did the nephritis and hypertension have any relation to his awareness of being sick, so to speak? A. I don't think so.

"Q. This is your conclusion here, I take it, and it is based upon the report which is in front of you? A. Right.

(A.25) "Q. Assuming that the condition of enlargement of the liver and nephritis had been of recent origin at the time of this examination and had not appeared previously in Herbert's records or on previous examinations prior to a year before this examination, can you comment on whether the patient was or must have been obviously aware that he had something else wrong with him besides bronchial asthma? A. From the findings that were obtained when this patient was examined, it is very probable that he may not have been aware of his other conditions.

"Q. Could he be aware, though? A. Had he been told by other medical personnel.

"Q. At the conclusion of this examination and of the findings and of the making of this report which is Government Exhibit 3, was it normal practice to give the veteran examined any of the information found? A. No.

(A.26) "Q. Was this information kept for the use of the Veterans Administration only? A. The information was kept for the use of the Veterans Administration only.

"Q. Was the veteran in any way advised as to his condition? A. No.

"Q. What action would be taken if the veteran had been found to be a sick man in some way or other? A. The veteran would have applied for treatment.

"Q. Let us assume that the veteran had some condition which he is not clearly aware of but which medical advice would determine that he should be treated for, what would be done in a case like that? A. Insofar as the Veterans Administration was concerned?

"Q. Yes. Assuming, of course, that the Veterans Administration policy at the time or regulations prevented you from disclosing to the veteran the exact diagnosis? A. The veteran wouldn't be advised to have definitive treatment.

"Q. The veteran would, under all circumstances, have to apply for treatment? A. Yes.

"Q. Or he would have to come in with complaints; is that correct? A. That's correct.

"Q. What could you tell me, if you know, ordinarily impelled veterans to come in and take examinations such as this? By that I mean, was it their own complaints or someone else, or were they asked to come in? A. This type of an examination is given because the veteran is usually drawing a compensation, and the Veterans Administration calls the veteran in for this examination.

"Q. In other words, this examination was not made on the veterans own complaint? A. That's right.

"Q. Or because of his own complaints. A. No.

The above testimony shows that while the veteran may have been suffering from other disabilities than Asthma, he would not know it.

Much is made in the brief about a notation to the effect that Herbert had been drinking a quart of liquor a day. This notation was on one of the medical reports. However, the correctness of this statement is challenged by a statement on a report of medical examination made two months prior thereto where the notation is made that the patient, Herbert, uses "No alcoholic beverages". (A.70)

The question of fraud in this case must be sustained upon the premise that Herbert knew that he was suffering from other diseases than Asthma. There is not a single iota of evidence in the record which shows that he k[illegible] he had other diseases at the time he applied for reinst[illegible] ment. The results of the examinations made by the go[illegible] ernment physicians were never disclosed to him. He pointed to the very file in which the medical reports were contained. Does this fact look like an "intent to defraud"? Furthermore, because he was suffering from a service incurred aggravated disability he had a right to reinstatement of his entire $10,000 and if he had any intent to defraud he would have applied for the full amount of the insurance. He furthermore would not have requested his

premiums to be deducted from his compensation payments. This fact alone shows no intent to defraud. All of these facts were overlooked by the Court of Appeals below.

Counsel for the Respondents cite a great many cases in their brief. If this Court has the time to read such cases, you will conclude that none of them are in point except the case of *Pence* v. *United States*, *316 U.S. 332* which is clearly in favor of the petitioner. Despite the confusion by the misstatements and half-truths contained in the respondent's brief when the facts are fully ascertained and applied to the evidence in this case, the conclusion must be reached that no evidence at all was introduced to show that there was an "intent to defraud".

The conclusion in the respondent's brief to the effect that the evidence offered by the government covered "intent to defraud", as required by the case of *Pence* v. *United States*, *supra*, is not sustained by any proof. The evidence is all to the contrary.

Unless this Court desires to overrule its decision in the case of *Pence* v. *United States*, this Court in its supervisory powers should grant the application for the writ of certiorari.

Respectfully submitted,

Claude L. Dawson,
Attorney for the Petitioner,
1049 Shoreham Building,
Washington 5, D. C.